# Central Law Journal.

ST. LOUIS, MO., AUGUST 7, 1896.

The *New York Law Journal* interestingly reviews the novel case of Williams v. Hays, 37 N. Y. Supp. 708, wherein the New York Supreme Court was called upon to decide as to the merits of the plea of insanity as a defense to torts growing out of negligence. In that case it appeared that defendant who was one of several joint owners of a vessel, he owning a minority interest, was under a contract with his co-owners by which he was to sail her on shares; he to man her, pay the crew, furnish supplies and have absolute control. On a former decision by the court of appeals (143 N. Y. 442), it was held that defendant was owner of the vessel *pro hac vice* and in no sense the agent of his co-owners. On a voyage for a southern port the vessel encountered storms, and defendant for more than two days was constantly on duty. Then, becoming exhausted, he went to his cabin and took a large dose of quinine, leaving the mate in charge. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the defendant, the captain, to come on deck, who refused to believe that the vessel was in any trouble and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his vessel was gradually and certainly drifting upon the shore, and in broad daylight she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Defendant's defense to liability for such carelessness is that he was unconscious and insane from the time of going to his cabin as aforesaid, until after the wreck, when he found himself in the life-saving station.

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The court of appeals when the case was before them held that the mere fact that the defendant may have been insane would constitute no defense for tortious negligence resulting in the loss of the vessel and cargo. The decision was by a bare majority, and the three members of the court who dissented did not give the grounds for their action. The opinion of the court, by Judge Earl, cites some authorities to the effect that insanity is not a defense to the recovery of damages in a civil action for torts of negligence. That judicial opinion is not, however, unanimous on the subject is suggested by the dissents in the New York case and also by utterances of various text writers. See Bevin on Negligence, 2d ed., 52-55; Wharton on Negligence, § 88, 2 Jaggard on Torts, 872; Clerk and Lindsell on Torts, II, 34. In his treatise on "The Common Law" (page 109) Justice Oliver Wendell Holmes, speaking of the liability of persons of various infirmities for negligence, says: "Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse."

Judge Cooley, who favors the opinion that lunatics should be held liable for tortious negligence (Cooley on Torts, 2d ed., 117), puts it on the ground of public policy—not, of course, on the ground of culpability of the lunatic. The broad policy of the law is that the estates of lunatics shall compensate for injuries sustained through their torts, in like manner as such estates are liable for the support of the lunatics themselves. To the same substantial effect is Shearman & Redfield on Negligence, at section 57. Our contemporary does "not perceive a logical basis for the distinction drawn by Justice Holmes between partial insanity and that of a 'pronounced type.' And, considering insanity simply in the abstract, without any reference to the cause that produced it, the theory of Judge Cooley would seem consistently to require its rejection as a defense to liability for merely passive torts of negligence."

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The court of appeals did, however, reserve the question whether defendant would be liable if he became insane solely in consequence of the great strain and exposure attending his efforts to save the vessel during

the storm. The court of appeals did not indicate in detail its grounds for such possible distinction, and in the recent decision by the supreme court this point was directly raised and passed on. It is held, all the justices concurring, that there is no valid reason for the distinction suggested, and that, under the court of appeals on the former appeal, the defendant would have to be held liable even though he became insane through his efforts to save the vessel. "As a mere naked and abstract proposition," says the *New York Law Journal*, "the position of the supreme court seems logical. Under the general rule that insanity is no defense for torts and no excuse for negligence it is of no consequence how the insanity arose." In the language of the opinion of the supreme court: "It seems to us clear that if an insane captain is bound to use the same case and skill in the management of his ship that a sane captain is bound to use, and is liable if he fails to exercise such care and skill, upon the principle that where one of two innocent parties must suffer the loss must fall on the one whose acts caused the injury, regardless of his intention or ability to perform his obligation in consequence of disease, the cause of such disease or insanity becomes entirely immaterial, provided that it is not caused by his voluntary act."

## NOTES OF RECENT DECISIONS.

CRIMINAL LAW — BURGLARY — CRIME INDUCED BY DETECTIVE.—The Supreme Court of Illinois, in Love v. People, 43 N. E. Rep. 710, has recently rebuked a most flagrant example of a frequent abuse of criminal prosecutions. It appeared on the trial of that case that there had been numerous burglaries committed in a town, and that the authorities employed a detective to discover the criminals. This detective became acquainted with the defendants, spent money on them, loaned them money, and repeatedly suggested to them that they should engage in burglary as a means of raising money. At last he made arrangements with one Hoag to put marked money in his safe, with the understanding that it should be burglarized, and one night, having made the defendants drunk, he led them to Hoag's office, opened the office and the safe himself, and took out the money and handed it to the defendants, who took it, and afterwards divided it among themselves. The court held that these facts did not warrant a conviction for burglary, and discharged the defendants. The following from the opinion of the court is well worth quoting: "Day after day and night after night his efforts were not directed to the arrest of criminals, but his mental powers and robust health, with the use of money, were directed towards an effort to make criminals of these young men; with plenty to drink and smoke and eat at his expense, he sought to undermine and dazzle their mental and moral strength, and lead them into the commission of crime. Ambitious, doubtless, to succeed in his chosen pursuit, with him the conviction of those theretofore guilty was less an object than that he might fasten on some one the commission of a crime. It he could make the criminal, and induce the commission of the crime, and cause the arrest of the actor, or throw around him a web of circumstances that would lead to conviction, it would redound to the glory of his chief, and cause his advancement. With him the end justified the means, and the reputation of the agency to which he belonged and his own advancement were apparently his object. Such means and agents are more dangerous to the welfare of society than are the crimes they were intended to detect, and the criminals they were to arrest."

CHATTEL MORTGAGE—ANIMALS—PRIORITY OF LIEN.—In Vining v. Millar, 67 N. W. Rep. 126, decided by the Supreme Court of Michigan, a chattel mortgage was given plaintiffs in Michigan by L on his half interest in three horses the other half interest in two of which was owned by plaintiffs. An arrangement between plaintiffs and L for racing them on shares was made, and they were taken into Canada; plaintiffs giving a bond for their return to the United States within 70 days. While they were in Canada L gave a mortgage on the horses to defendant, who, with the consent of L, put them in the care of an hotel keeper, at the race track, to hold possession for him. L having abandoned the horses, plaintiffs got them of the hotel keeper, who said nothing of defendant's claim. It was held, that defendant's mort-

gage had priority, he having been a mortgagee in possession when plaintiffs took the horses from the hotel keeper. Grant, J., dissented. "We have then a case," says the court, "in which the mortgagee in Canada has taken possession of mortgaged property, and in which the mortgagor has, without his assent, regained possession, transported the property to Michigan, and a prior lienholder has asserted a lien which, while the property was so in the possession of the Canadian mortgagee, was inferior to the Canadian lien. To give the Michigan lien priority under these circumstances is certainly to go a step further than this court has yet gone. In the cases of Montgomery v. Wight, 8 Mich. 143; Boyden v. Goodrich, 49 Mich. 65, 12 N. W. Rep. 913, and Corbett v. Littlefield, 84 Mich. 30, 47 N. W. Rep. 581, it appears that the foreign mortgagee permitted the mortgagor to retain possession. In Corbett v. Littlefield it was said distinctly that the mortgagee had it in his power to protect himself by taking possession of the mortgaged property. It can hardly be said that it was intended to imply that he must, in addition to taking possession, stand guard over the property constantly, to see that the mortgagors do not take it out of his possession and to another jurisdiction. If, in fact, Millar was invested with possession, it is difficult to see how he could do more to protect himself, unless an absolute duty does rest upon him to see that no person with or without right shall take it beyond the jurisdiction; and I cannot understand why this duty should be imposed upon a mortgagee in possession any more than it is upon an absolute owner. Without regard to the record of the mortgage in Canada, it was good as against any but creditors who became such after the mortgage was made and before possession was taken, or prior creditors who had acquired a lien before possession was taken by the mortgagee. Waite v. Mathews, 50 Mich. 392, 15 N. W. Rep. 524."

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LOBBYING CONTRACTS — VALIDITY—PUBLIC POLICY.—In Houlton v. Nichols, decided by the Supreme Court of Wisconsin, it appeared that plaintiff, a person of large experience in regard to federal public lands, became satisfied that a certain class of lands, that had been kept out of the market on account of a supposed claim under certain railroad grants, could be legally thrown open to settlement, entered into an agreement with defendant, who was desirous of acquiring such lands, to instruct the latter in regard to the manner of procuring the same, and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain proportion of the value of the land acquired by defendant. It was held that the contract was not *per se* invalid as against public policy. The general condemnatory policy of the law toward "lobbying contracts," is referred to in the following language:

> The principal question here presented is, was the contract entered into between plaintiff and defendant void, as against public policy? And that turns on whether it embraces by its terms or by necessary implication an agreement to do an illegal act or to resort to secret and improper tampering with official action, either legislative or otherwise, to effect the purposes of the agreement, or that such was its tendency. If, by its terms, or by necessary implication, the agreement stipulated for corrupt action or personal solicitation in the nature of lobbying, or tended directly to such results, then it is void; and, if such facts appear satisfactorily, the court should not hesitate to put the seal of condemnation upon it. The rules governing this subject are as old, at least, as the common law, have been long and firmly established in our jurisprudence, and must be rigidly enforced by courts of justice, else purity and integrity in the administration of government will be seriously imperiled. All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of the government, are contrary to sound morals, lead to inefficiency in the public service, and come under the condemnation of the rule here under consideration. The following are a few of the cases that might be cited in support of the foregoing proposition: Tool Co. v. Norris, 2 Wall. 45; Elkhart County Lodge v. Crary, 98 Ind. 238; Lyon v. Mitchell, 36 N. Y. 235; Winpenny v. French, 18 Ohio St. 469; Mills v. Mills, 40 N. Y. 543; Milbank v. Jones, 127 N. Y. 370, 28 N. E. Rep. 31; Trist v. Child, 21 Wall. 441; Powers v. Skinner, 34 Vt. 274; Bryan v. Reynolds, 5 Wis. 200; Fuller v. Dame, 18 Pick. 472; Chippewa Valley & S. Ry. Co. v. Chicago, St. P., M. & O. Ry. Co., 75 Wis. 224, 44 N. W. Rep. 17. In the last case there is a very exhaustive discussion of the general subject in an opinion by Mr. Justice Cassoday, including numerous citations of authorities, which might be extended to include all reputable courts in aid of the views above expressed. There is no failure exhibited anywhere to rigidly maintain the high standard of sound morals in public affairs which a correct application of the rule here invoked requires. In Marshall v. Railroad Co., 16 How. 314, the learned judge who wrote the opinion said, in effect, public policy and sound morals imperatively require that courts shall condemn every act, and pronounce void every contract, the elements or probable tendency of which would be to sully the purity or mislead the judgment of those to whom official position has been intrusted, and this court, in Chippewa Valley & S. Ry. Co. v. Chicago, St. P., M. & O. Ry. Co., *supra*, quoting with approva from Clippinger v. Hepbaugh, 5 Watts & S. 315, said

in effect, that it matters not that nothing improper is done, or expected to be done. It is enough if such is the tendency of the contract—that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt persons, to improper tampering with public officers, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt, but if it corrupts or tends to corrupt, or if it deceives or tends to deceive, that is sufficient to stamp its character with the seal of disapproval before a judicial tribunal. • • • So far as appears from the evidence in this case, plaintiff had acquired all his information in respect to the legal *status* of the lands in question, their location and value, before the contract was made with the defendant. No legislation was had, solicited or required. The only thing plaintiff did after making such contract, and the only thing contemplated, was to make such presentation before the secretary of the interior as to satisfy such officer of the legal *status* of the lands, and that they should be thrown open to settlement under existing laws, which would secure to the first settler thereon priority thereto; and there is no element in the agreement, the performance of which, by necessary or reasonable inference, tended to any other result. It appears that plaintiff did not go before such department, and make such presentation, and urge such action as a favor to his principals, but as a right to which they, and all other persons similarly situated, were entitled. Looking at the contract and its tendency, as above stated, the elements requisite to warrant the court in condemning it as contrary to public policy are absent. Hence, it must be sustained as a binding agreement between the parties.

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MASTER AND SERVANT—LIABILITY FOR MALICIOUS ACT OF SERVANT — VINDICTIVE DAMAGES.—The Supreme Court of California decides in Warner v. Southern Pac. Co., 45 Pac. Rep. 187, that a railroad company is not liable for vindictive or punitive damages on account of a wanton or malicious act of a conductor of one of its trains toward a passenger in executing the authority given him, unless the malicious act was either authorized or ratified. It is at most only liable for the actual damages sustained. The following is from the opinion of the court:

In the recent case of Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. Rep. 234, it was held that the defendant was not liable for damages caused by the wanton and mischievous backing of a locomotive by an engineer with intent to frighten passengers on an approaching street car. Perhaps the rule now is—and we will assume it to be so for the purposes of this case—that the master is liable for actual damage caused by an act of the servant done in the execution of authority given by the master, although it was caused "by a wanton and reckless purpose to accomplish the master's business in an unlawful manner" (93 Cal. 562, 29 Pac. Rep. 234); but it is not the law that in such a case the master is liable for more than will compensate the injured person for the damage which he has sustained. The master is not liable in such a case for vindictive damages, or "smart money," unless he had either authorized the malicious act of the servant beforehand, or had ratified it afterwards. There are some authorities the other way, but the preponderance of adjudicated cases, and the entire force of the reasoning upon the subject, establish the law as above stated. The entire basis of the doctrine of vindictive damages is that the person himself who is sued has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty. If the driver of a merchant's delivery wagon should wantonly run over another person, it would be hard enough for the master to be held liable for all actual damage caused by the unlawful act of his servant; but to go beyond that, and allow a jury, in addition to compensating the injured party for his loss, to inflict further damages as a punishment for something which he did not do, would be to allow a gross outrage not sanctioned by any principle of justice.

The decisions outside of this State establishing the principle above declared are innumerable, but it is unnecessary to refer to them here in detail, because the leading cases on the subject are referred to and cited in the comparatively recent case of Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261, in which the Supreme Court of the United States reviewed the whole subject, and held the law to be as hereinbefore declared. In that case the only question before the court was whether a railroad company could be charged with punitive damages for wrongful treatment of a passenger by a conductor; so that the whole attention of the court was directed to that one point. There a conductor had been guilty of grossly oppressive acts towards the plaintiff, who was a passenger, because the latter had offered tickets which the conductor deemed insufficient, and had subjected him to great humiliation; and counsel for defendant admitted at the trial that plaintiff "was entitled to recover actual damages." But the trial court instructed the jury that: "After agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton, and oppressive;" and for giving this instruction, and for this alone, the judgment was reversed. Counsel for defendant in error in the opening of his brief, said: "But one question arises upon the record, and that is, under the facts, is plaintiff in error liable for punitive damages?" and the court, at the commencement of its opinion, said: "The simple question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger." Therefore, the opinion in that case was an absolute, definite decision of the point, and not a mere statement of *dicta* about a question not necessarily involved. The opinion delivered by Mr. Justice Gray is quite long and exhaustive. We will make from it only a few quotations, to show its general character. The court, among other things, say: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable

to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent." Again, the court uses the language employed in Keene v. Lizardi, 8 La. 26, as follows: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justified in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of the factor or agent;" and then cites a large number of cases, including one from California, which are said to be "to the same effect." And again the court say that "the rule has the same application to corporations as to individuals." Again, the court say: "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents." Again, the court say: "The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island," in Hagan v. Railroad Co., 3 R. I. 88, and numerous quotations are made from the opinion of Justice Brayton, of which we take the following: "If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed where the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal, and make him *particeps criminis* of his agent's act." A quotation to the same effect is made from the court of appeals of New York; and the court say that: "Similar decisions, denying upon like grounds the liability of railroad companies and other corporations sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas and West Virginia." It is clear, therefore, that under the general authorities, including the decision of the highest court in the land, the law is established as heretofore declared.

Turning to our own State, we find that, with the single exception of some expressions in the opinion delivered in one of the departments in Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. Rep. 1112, the decisions here have been in harmony with and declaratory of the principle above stated. See Wardrobe v. Stage Co., 7 Cal. 119; Turner v. Railroad Co., 34 Cal. 594; Wade v. Thayer, 40 Cal. 586; and Mendelsohn v. Lichter Co., *Id.* 657.

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GARNISHMENT—LIABILITY OF COUNTY TO PROCESS.—A county is not subject to garnishment in the absence of any statute making counties liable to such process; and such statutory provision does not exist by reason of the fact that corporations are named among those on whom such process may be served, where municipal corporations are not expressly provided for. The above is the conclusion of the Supreme Court of Washington in State v. Tyler, 45 Pac. Rep. 31. The court says in part:

It follows that the material question is as to whether or not a county is, under our statute, subject to garnishment. This is an important question, and has been elaborately argued by counsel. The authorities upon the subject are not entirely uniform, but from the cases cited in the briefs, and from such other cases as we have been enabled to examine, we are satisfied that an overwhelming weight of authority is in favor of the proposition that counties are not subject to garnishment. It is held that a county is organized for public purposes, and should not be made the instrument by the aid of which to obtain private ends; that public policy will not permit the business of such corporation to be interfered with by private parties in the pursuit of their own private objects; that, for these and other reasons, such corporations are not subject to this process, unless the legislature has, by express enactment, so provided; that the intention of the legislature to so provide will not be inferred from the fact that it has authorized such corporation to be sued, nor from the fact that it is provided in the act relating to garnishment that corporations are subject thereto.

The reasons above outlined were well stated by Mr. Justice Lawrence in delivering the opinion of the court in the case of Merwin v. City of Chicago, 45 Ill. 133, in which that learned judge made use of the following language: "A large and growing city, like Chicago, must constantly have hundreds of persons in its employment; and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in much expensive and vexatious litigation, in which it has no interest, but if unable to safely pay it employees and contractors, it may lose the services of persons that may be of much value. We understand, however, the counsel for the appellant to concede that money due municipal officers, agents or contractors, is not liable to garnishment; but it is insisted, if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for pri-

vate purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities or expenditures, merely to promote private interest or private convenience." If what was said in this case was true as to a strictly municipal corporation, like a city, it is much more true as to a *quasi* municipal corporation, such as a county, for the reason that the latter is an involuntary corporation, organized exclusively in the interest of the public, and as an agency of the State, while the former may be held to be organized in some sense for the private benefit of its inhabitants. To a like effect, and founded upon substantially the same course of reasoning, are the following cases: Switzer v. City of Wellington (Kan. Sup.), 19 Pac. Rep. 620; Wallace v. Lawyer, 54 Ind. 501; McDougal v. Hennepin Co., 4 Minn. 184 (Gil. 130); State v. Eberly, 12 Neb. 616, 12 N. W. Rep. 96; Hawthorn v. City of St. Louis, 11 Mo. 59; City of Erie v. Knapp, 29 Pa. St. 173; Mayor, etc. v. Rowland, 26 Ala. 498; Mayor, etc. v. Root, 8 Md. 95; Burnham v. City of Fond du Lac, 15 Wis. 193; Buffham v. City of Racine, 26 Wis. 449; School Dist. v. Gage, 39 Mich. 484; McLellan v. Young, 54 Ga. 399; Merrell v. Campbell (Wis.), 5 N. W. Rep. 912.

In his reply brief, counsel for appellant has sought to show that some of these cases are not in point, by reason of the fact that they were decided upon appeal from judgments holding municipal corporations liable, and were, therefore, rightfully decided, even though the lower court had jurisdiction to render the judgments, if such judgments were erroneous. But the language of the opinions in the cases thus referred to clearly shows that such corporations were not subject to garnishment at all, and that, by reason of this fact, they were under no obligation to answer when served with garnishee process. The case of Merwin v. City of Chicago, *supra*, is a fair representative of this class, for, while the questions therein were raised upon appeal, the action of the lower court in dismissing the city without requiring it to answer was sustained, and this could only have been done upon the theory that the fact that it was such city was sufficient to excuse it from answering, and this could only have been so by reason of the fact that under no circumstances was it liable in such a proceeding; for, if it was liable at all, it would have been necessary for it to have made a showing, before it was entitled to be discharged. Appellant has attempted to show that other cases are not in point by reason of the fact that their decision depended upon the statutes of the State in which they were rendered; but a careful comparison of the statutes of such States with ours clearly shows that, in most, if not all, of them, the provisions are such that they would better authorize a holding that municipal corporations were liable to garnishment than would the provisions of our statutes. In all of them there is as broad a provision as to suing and being sued, and the acts providing for garnishee or trustee process cover corporations in language which would better authorize the inclusion of those for municipal purposes than does the language in our statute.

Under all of the authorities, we are satisfied that the law is, and should be, that municipal corporations, and especially counties, are not liable to garnishment unless made so by express statutory provision, and that such express statutory provision does not exist by reason of the fact that corporations are named as among those upon whom process in garnishment may be served, unless municipal corporations are expressly provided for.

## UNOFFICIAL ENTRIES BY THIRD PERSONS.

One of the most interesting questions of evidence, and one that is very inadequately treated by the text-writer, is the admissibility of declarations or written entries, made by persons having peculiar means of knowledge, as evidence between third persons after the death of the declarant. This doctrine is one of the nearest approaches to hearsay that the law tolerates. The English rule favors its admissibility in cases where the declaration or entry was against the interest of the declarant. This species of evidence is included by Stephen under his article concerning "Declarations against interest." The leading English case, containing, as Stephen says, "the best statement of the law upon this subject," is Higham v. Ridgway.[1] The question there was whether a certain person was born on a certain day, and the following entry in the book of a deceased man-midwife was admitted in evidence. "W. Fowden, Junr's Wife. *Filius circa hor. post merid. natus* H. W. Fowden, Junr. App. 22, *filius natus*, Wife, £1, 6s. 2d. Pd. 25 Oct. 1768." In Doe v. Beviss,[2] the question was whether a gate on land in dispute was repaired by A, and the account of a deceased steward, in which he charged A for such repair, was held irrelevant, although it was conceded that it would have been otherwise if it had appeared that A had admitted the charge. In Williams v. Geaves,[3] the question was whether A had received rent for land, and the account of a deceased steward, charging himself with such receipt, was admitted, although the balance of the whole account was in favor of the steward. In Reg. v. Heyford,[4] on the question whether certain repairs were made at A's expense, a bill therefor receipted by a deceased carpenter was deemed competent; there being no other evidence of the repairs or that the money had been paid. This was followed by Jessel, M. R., in Taylor v. Witham,[5] dissenting from the contrary conclusion of Doe v. Vowles.[6] But in Sussex Peerage Case,[7] it

[1] 10 East. 109.
[2] 7 C. B. 456.
[3] 8 C. & P. 592.
[4] 2 Smith L. C. 333, 7th ed.
[5] L. R. 3 Ch. Div. 605.
[6] 1 Mo. & Rob. 261.
[7] 11 Cl. & F. 108.

was held that on a question of the celebration of a marriage, the statement of a deceased clergyman that he had performed the ceremony, under circumstances that would have rendered him liable to criminal prosecution, was not competent as a statement against interest. And in Haden v. Burton,[8] entries in the books of a deceased tradesman, of charges for building a cottage, and showing payment by the lord of the manor, were rejected. The evidence was admitted in Higham v. Ridgway, on the ground, as stated by Lord Ellenborough, "that the entry was made in prejudice of the party making it." Le Blanc, J., "would not be bound at present to say that they are not evidence" even if not against interest, but declined very sensibly to express an opinion on that question. The decision was based in great degree on Warren v. Greenville,[9] and comments on it by Lord Mansfield in Goodtitle v. Duke of Chambers,[10] but it would answer no useful purpose to go back of Higham v. Ridgway, which stands as the present law of England, except to explain that in Warren v. Greenville, the book of a deceased attorney was admitted to prove the surrender of a life estate, and in Patteshall v. Turford,[11] a memorandum of service of a notice to quit, made by a deceased attorney on a duplicate, was held competent. So in Price v. Earl of Torrington,[12] a book kept by a clerk, in which he set down at night an account of beer delivered by draymen during the day, and to which they put their names, according to the usual way of the plaintiff's dealing, was held good evidence of delivery to the defendant, the drayman who delivered the beer in question being dead. In some cases attorney's entries in their business have been admitted, though not against interest, and though there was no duty to make them, because made in the usual course of business.[13] Higham v. Ridgway is cited and its doctrine approved by Greenleaf,[14] and is substantiated by Hosford v. Rowe,[15] Bird v. Hueston,[16] Holladay v. Littlepage,[17] Peck v. Gilmer,[18] Hinkley v. Davis.[19] "If there is anything settled, it is that the rule excluding hearsay evidence does not apply to oral or written declarations of deceased persons made against their interest."[20] Cases involving the precise principle of Higham v. Ridgway, and relating to declarations or non-official entries by third persons, not claiming any ownership or interest in the matter, are not common in this country. Mr. Wallace, in his note to Higham v. Ridgway,[21] says: "But although there are *dicta* in favor of the point of Higham v. Ridgway, it is believed that there is no adjudged case in the United States which establishes it as a principle that admissions or entries by a third person against his interest are admissible evidence after his death." But he is wrong. Wharton cites Higham v. Ridgway with reference to a number of authorities which are not in point, and Prof. Thayer includes it in his valuable "Cases on Evidence." The tendency in this country is to eliminate the condition that the entry was against interest. Story in Nicholls v. Webb,[22] the case of a notary's entry, cites Higham v. Ridgway, and says of that condition: "This seems very artificial reasoning, and could not apply to the original entry in the day-book, which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service. So that in truth, at the time of the entry, it was not against the party's interest." He continues: "We think it a principle that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." In Leland v. Cameron,[23] the entry by an attorney in his register, in the proceedings in an action, of the issuing of an execution which could not be found, the attorney being dead, was held to be competent evidence of the fact that the execution was issued. This was put on the ground that the entry was in the usual employment and with-

[8] 9 C. & P. 254.
[9] 2 Strange, 1129.
[10] 2 Burr. 1072.
[11] 3 B. & Ad. 890.
[12] 1 Salk. 285.
[13] Reece v. Robson, 15 East, 32; Clark v. Wilmot, 1 Y. & C. C. C. 53; Marks v. Lahee, 3 Bing. N. C. 408.
[14] Ev. § 147.
[15] 41 Minn. 247.
[16] 10 Ohio St. 428.
[17] 2 Munf. 316.
[18] 4 Dev. & Bat. 249.
[19] 6 N. H. 210.
[20] Taylor v. Gould, 57 Pa. St. 152.
[21] 2 Sm. L. C. 291.
[22] 8 Wheat. 334.
[23] 31 N. Y. 115.

out any motive or interest to misrepresent. In Livingston v. Arnoux,[24] a receipt signed by a deceased sheriff, of redemption money after sale on execution, was held admissible to prove redemption, on the authority of the last two cases cited above, on the ground of those decisions, and also on the separate ground that it was against interest. In Augusta v. Windsor,[25] a physician's entries were admitted on a question of settlement of a pauper, to prove that he had performed surgical service at a certain time, the court explicitly holding that it need not appear that they were against interest, and citing the earlier English cases. In White v. Chouteau,[26] an action by a broker for the price of goods claimed to have been purchased and paid for by him and delivered to the defendant, the declaration of the former owner, deceased, that he had received payment therefor from the plaintiff, was admitted on the authority of Higham v. Ridgway. One judge dissented. In Arms v. Middleton,[27] an entry was admitted in circumstances not imposing the duty, and where it was not against interest, but was simply in accordance with the business habit of the person making it, namely, a register of births kept by a physician in his own practice, the court observing: "It is not necessary, as appears by several of the cases, that there should be an absolute duty, on doing an act, to make an entry of it, to render the entry admissible after the death of the person making it; it is sufficient that it is a proper case for making an entry of the act, and that such is his usual practice," citing Augusta v. Winslow, *supra*. In Baldwin v. Hall,[28] the court approved the general principle, but deemed it essential that the entry should be against interest. This decision is cited, *obiter*, with approval, in Forgay v. Atlantic M. Ins. Co.;[29] but in Matter of Paige,[30] it was said, *obiter*, that a memorandum in the handwriting of a physician, in an account book kept by him, of the time a child was born under his attendance, is inadmissible as evidence of the time of the birth, after the death of the physician, unless it is "supported by proof of its truth." The entry charged $3 for the services, and on the opposite page it was marked "settled." This seems clearly wrong; within all the cases, no authorities are cited, and the judge simply observes that he "knows of no rule of evidence which would allow such a memorandum," etc.

In New Hampshire,[31] to show the character and extent of an injury to a wagon wheel alleged to have been caused by a collision with the defendant's locomotive, plaintiff proved that several spokes had been broken as though by a blow, and that a person since deceased had repaired the wheel. The account book of the deceased person was offered in evidence. It showed a charge against the plaintiff for sixteen spokes, together with a stated price. The court held the evidence admissible to prove that the injuries were caused by the collision. This is a very exhaustive treatment (after the New Hampshire manner) of the subject. Higham v. Ridgeway was chiefly relied on, and many other English cases were cited; also Nourse v. McCay,[32] where to prove that a deed was forged, the account book of a deceased magistrate, showing charges for taking acknowledgments of three other deeds on the same day, and none for the acknowledgment of the deed in question, was held admissible. Also State v. Phair,[33] an indictment for the murder of Mrs. Freeze. After the murder the prisoner had pawned a watch. To identify the watch as hers, a book kept by Parmenter, a deceased jeweler, containing a description of watches repaired by him, was offered in evidence. It contained the following entries: "Dec. 11, 1871, Mrs. Freeze, gold anchor, Freeres (maker), No. 56,376, cleaning screw, repairing jewel, $1.50. Jan. 17, 1873, Mrs. Freeze, gold anchor, Freeres, No. 56,376, cleaning and jewels, $2.00." It was held admissible, although it does not appear that the charges were marked paid, or in any other way that they had been paid, and although counsel urged, on the authority of Higham v. Ridgway, that it must appear that the entries were against interest. This is a very satisfactory case on the facts, although there was little discussion of

[24] 56 N. Y. 507; same effect, Field v. Boynton, 33 Ga. 238.
[25] 19 Me. 317.
[26] 1 E. D. Smith, 497.
[27] 23 Barb. 571.
[28] 131 N. Y. 160.
[29] 2 Robt. 96.
[30] 62 Barb. 476.
[31] Lassone v. Boston, & L. R. Co., 24 Atl. Rep. 902, 46 A. L. J. 273.
[32] 2 Rawle, 70.
[33] 48 Vt. 366.

the point expressed in the opinion, the court simply citing Price v. Torrington and Welsh v. Barrett, *infra*, and observing: "The principle seems to be founded in good sense and public convenience." It is quite amusing to note the difference in stress deemed necessary on the different sides of the Connecticut River, for New Hampshire dismisses in six lines what Vermont expends as many pages upon.

The doctrine is universally applied in cases of official or *quasi* official entries; as for example: the church record of a baptism to prove the date of the baptism;[34] so of a notary's entries.[35] In Hunt v. Order of Chosen Friends,[36] the court observed: "Those baptismal registers serve a purpose equivalent to that served by family records. In this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. There is not much authority on the subject here, but all the analogies which apply to other presumptively correct documents apply to these." Citing Hutchins v. Kimmell[37] (marriage); Durfee v. Abbott,[38] (baptism but not age); Lewis v. Marshall[39] (burial). The court continues: "The rejection of such proofs would be disastrous. They are relied on by the whole community." So held, on a trial for abducting a girl under sixteen, of an entry made by a school teacher of the age of pupils on entering schools.[40] So of entries made by a bank messenger in his book of demands on and notices to makers of notes left in the bank for collection.[41] The learned annotator of Higham v. Ridgway,[42] is of opinion that that case lays down "the true principle" that entries made in a private business must be against interest, and that the absence of that condition is only excused in cases of official entries, but he admits that "the American cases appear to have melted these two into one, and to have settled the very reasonable and useful rule that all entries made in the regular course of business, public or private, are admissible though not against interest."

The doctrine is applied to oral declarations as well as to entries. The only authority to the contrary seems to be a *dictum* in Lawrence v. Kimball,[43] an action against an owner for selling property for taxes, on the ground that they had been paid to a deceased collector, where Shaw, C. J., excluded oral declarations, observing: "It was argued that this was within another exception to the rule respecting hearsay, viz: that the admission was made by the collector, in a matter against his interest at the time, inasmuch as it rendered him liable to the town as for so much money collected. Higham v. Ridgway, 10 East, 109. But we think this has been confined wholly to the case of entries made in books, or other receipts, documents, or written memoranda, made by a person deceased, in relation to a matter contrary to his interest at the time, and which went to charge him with some debt or duty. 10 East, *ubi sup.;* De Rutzen v. Farr, 4 Adolph. & Ellis, 53. This distinction was taken and relied on, and made the ground of decision in Framingham Manufacturing Co. v. Barnard, 2 Pick. 532. It was founded mainly on the consideration of the clearness and certainty of such written memorada made by a party, against his interest, in contradistinction to the looseness and uncertainty of verbal statements, or even of letters. We think, upon a view of the authorities, that the evidence was not admissible on that ground. It was evidence of the statements of the collector, not in writing, made to third persons, in the course of casual conversation, and not in the exercise of his authority as collector." This distinction is disapproved in Livingston v. Arnoux,[44] the court saying "there is no principle upon which it can be supported." The entry must be substantially contemporaneous with the fact.[45]

It is a mooted question whether such entries as we have been discussing are admissible where the person who made them is not dead, but living and insane, or beyond the jurisdiction of the court. This

[34] Whitcher v. McLaughlin, 115 Mass. 167.
[35] Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346. See Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207.
[36] 64 Mich. 671, 8 Am. St. Rep. 855.
[37] 31 Mich. 126, 18 Am. Rep. 164.
[38] 61 Mich. 471.
[39] 5 Pet. 470.
[40] People v. Brow, 90 Hun, 514.
[41] Welsh v. Barret, 15 Mass. 379.
[42] 2 Sm. L. C. 271.
[43] 1 Metc. 524.
[44] *Supra.*
[45] Kinglake v. Beviss, 7 C. B. 456.

question and the conflict in respect to it are exhaustively considered in Vinal v. Gilman.[46] In Builgewater v. Roxbury,[47] the principle was extended to the case of entries by a person who had subsequently become insane and incompetent to testify, and it was held that they need not be against interest. This was a settlement case, and the entries were those of a physician charging the town for his attendance upon the paupers. Citing Ashmead v. Colby[48] and Abel v. Fitch.[49] It is undoubtedly true, however, as stated in that case, that such entries are only admissible when made in the course of business, either private or official, and that mere private memoranda or entries, disconnected from any business or professional practice, are incompetent to affect the rights of third persons. For example, a diary of a mere observer, even though so detailed and accurate as that of Mr. Samuel Pepys, would be mere hearsay, and therefore inadmissible, as independent evidence, however competent it might be to refresh the memory of a living witness. So an entry by a master in his private book, showing the nature of the hiring of a servant, was rejected in a settlement case.[50]

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[46] 21 W. Va. 301, 45 Am. Rep. 562. See also Culver v. Marks, 122 Ind. 554, 17 Am. St. Rep. 377; Brewster v. Doane, 2 Hill, 537. In the last case it is laid down that they are admitted only from the necessity of the case, and if the declarant is living that necessity does not exist.

[47] 54 Conn. 213.

[48] 26 Conn. 289.

[49] 20 Conn. 96.

[50] Reg. v. Worth, 4 Q. B. 132.

## ALIENATING CONJUGAL AFFECTION — IMPEACHING A WITNESS.

### TUCKER v. TUCKER.

*Supreme Court of Mississippi, May 4, 1896.*

1. A father-in-law is not liable to his daughter-in-law for alienating her husband's affections, if he acted in good faith for the happiness of his child.

2. The character of a witness cannot be impeached by showing her to be of probably unchaste character.

WOODS, J.: The action of the court below is complained of by the appellant in 21 assignments of error. We notice such only as are necessary to the determination of this appeal.

The sixth, seventh, eighth, and ninth assignments may be disposed of together, and briefly. The conversations had between appellant and appellee, which it is alleged were improperly permitted to go to the jury, because not given notice of in the bill of particulars, occurred long after Norman Tucker had deserted the appellee, and were inadmissible as evidence showing or tending to show the substantive offense charged in the declaration. That offense, if ever committed, was long past, and the subsequent conversations of appellant, if offered in evidence to show the independent fact of desertion by reason of appellant's wrongful persuasion and inducement thereto, were competent, in this aspect, only if they were in the nature of confessions. That they were not of the character of confessions is plain, and, looked at as they are by complaining counsel, they were incompetent. But, looked at as evidence showing or tending to show the motive of appellant in his supposed wrongful action, they were competent; for, as counsel for appellant ably and correctly argue throughout their exhaustive brief, the motive of appellant was a question of the first importance. If these conversations are given their fair and legitimate construction, they should be found to be helpful to the defense; for, in one of them, the appellant, the father of appellee's husband, expressed to appellee the opinion that it would be best for appellee and her husband to remain apart. But, however a jury may regard this, we think they were competent as tending to show motive in appellant.

The tenth, eleventh, twelfth, and thirteenth assignments may be properly considered together. It was sought to show, by Imogene Hyatt, that she had, some time before the trial of the cause, been arrested, with a male companion, in a house of ill fame in Indianapolis, in the State of Indiana. This the court refused to permit to be done by appellant's counsel on their cross-examination of the witness, but, on re-examination allowed the witness to make an extensive statement as to circumstances offered to show, and tending to show, that on that occasion by the machinations of appellant and others nearly related to him, she was entrapped into that dishonorable position. After this re-examination, appellant's counsel proposed to cross-examine the witness on this new evidence, and their request was twice refused. That the course pursued by the court was unfair to the appellant is manifest, and that it was essentially prejudicial to appellant is too clear for disputation. The witness was permitted to make quite a full statement of facts as to her being arrested in a house of prostitution, and as to her having been entrapped therein by the appellant's agency, as the necessary implication was; and then the door to all further inquiry on this line was closed, thus leaving the appellant to the mercy of the jury, branded by the witness as one who had wickedly had her entrapped into the horrible situation indicated, and whose mouth, as well as that of his accusatory witness, was absolutely shut to any

defense he might have been able to make to this damning evidence against him. Now, the character of a witness for truth may not be impeached by showing her to be of probably unchaste character, and the evidence as to Mrs. Hyatt's having been arrested in the brothel was, in the first instance, properly excluded; but the court should have continued to exclude it. And assuredly, in common fairness, it should not have been permitted to be used by appellee to her heart's content, and any attempt to examine into it have been denied appellant. The effect of this action of the court was, we repeat, necessarily and immensely prejudicial to appellant.

Before proceeding, now, to consider the mistake of law which runs through the instructions generally, we desire to call attention to the ambiguity of the language of appellee's first charge. By it the jury were told that they were "the exclusive judges of the evidence, its weight and effect, and of the credibility of the witnesses." For appellant it is earnestly contended that, by this charge, the jury were told that they were judges of the weight of the evidence and of its legal effect; in other words, that they were made judges of the law as well as of the facts. Of course, the answer of appellee's counsel is that this is not the natural or reasonable interpretation of the charge, and that, by the use of the word "effect" the jury were intended to be informed, and, in fact, were only informed, that they were the judges of the weight of the evidence, and of its value as showing what facts might be said to be fairly established by it. That able and accomplished and upright counsel differ so widely as to the meaning of the language makes it at least not amiss to suggest the obviation of this objection by other and unambiguous language on another trial.

A few general observations on the law applicable to the conduct of a parent in counseling and advising a married child, in cases of this character, will suffice to show the erroneous view which prevailed in the trial below, without considering seriatim the charges given and refused, or modified by the court. In every suit of this character, the principal inquiry is, from what motive did the father act? Was it malicious or was it inspired by a proper parental regard for the welfare and happiness of the child? The instinct and conscience unite to impose upon every parent the duty of watching over, caring for, and counseling and advising the child at every period of life, upon marriage and after marriage, whenever the necessities of the child's situation require or justify such action on the parent's part. The reciprocal obligations of parent and child last through life, and the duty of discharging these divinely implanted obligations is not and cannot be destroyed by the child's marriage. Multiplied instances will occur to the mind in which a failure of the father to speak and to act would be regarded with horror. A daughter who has recklessly contracted an undesirable marriage with a man utterly unworthy to be the husband of a virtuous woman, against the wish and over the vigorous protest of the father, and who has, by such ill-starred union, been brought to wretchedness and humiliation and want of the ordinary comforts of life, may surely be advised, counseled, and cared for in the paternal home, even against the will and expressed wish of the unfaithful husband. The question always must be, was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice and in his action he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have 12 men pass upon the integrity of his intentions. The third, fourth, and seventh instructions given for the appellee ignore this rule of law, and put the father upon the footing of a stranger who intervenes between husband and wife, and they are therefore erroneous. For the same reason the first, ninth, eleventh, and twelfth instructions asked by appellant should have been given as asked, and without the modifications made by the court.

Cases of this character do not abound, and the present appeal presents the question of a father's liability for the first time in our courts. The learned court and able counsel for appellee misconceived the liability of the parent, and held him to the rigid accountability imposed upon strangers who invade the domestic circle and separate husband and wife. See Hutchinson v. Peek, 5 Johns. 195; White v. Ross, 47 Mich. 173, 10 N. W. Rep. 188; Burnett v. Burkhead, 21 Ark. 77; Payne v. Williams, 4 Baxt. 583.

Reversed and remanded.

NOTE.—*Alienating Conjugal Affections.*—It was at one time doubted whether, at common law, a wife had a right of action against one who was instrumental in alienating from her the affections of her husband, on the ground, as stated in Blackstone's Commentaries, that the inferior (the wife) had no kind of property in the company, care or assistance of the superior (the husband), and therefore could suffer no loss or injury relative thereto. In some cases such actions were dismissed by the courts. It is now held, waiving the question whether such action could lie at common law, that under the spirit of our institutions and various statutory provisions, the husband and wife have analogous rights relative to each other, and such suits may be maintained. Williams v. Williams, 20 Colo. 51; Railsback v. Railsback, 12 Ind. App. 659; Van Olinda v. Hall, 34 N. Y. Sup. 777; Price v. Price, 91 Iowa, 693; Haynes v. Nowlin, 129 Ind. 581. They may be brought against those who unlawfully produce such alienation by sowing the seeds of discord and hatred between man and wife. Hutcheson v. Peck, 5 Johns. 196. As a general rule, slight acts of this character will support the action (Bennett v. Smith, 21 Barb. 439), provided the alienation is produced thereby. Van Olinda v. Hall, 34 N. Y. Sup. 777. Actual separation is not necessary, since the gist of the action is the loss of the consortium, and the lessening of the value and comfort of the services and society of the consort. Heermance v. James, 47 Barb. 120; Adams v. Main, 3 Ind. App. 232. The same consequences

ensue when the alienation is only partial. Fratini v. Caslani, 66 Vt. 273. No pecuniary loss need be shown. Adams v. Main, *supra*; Rice v. Rice, 104 Mich. 371. If the conduct was unjustifiable, and caused the injury, the jury may infer malice from such conduct. Westlake v. Westlake, 34 Ohio St. 621. The conduct of the plaintiff toward, and lack of affection for, the consort may be shown in mitigation of damages. Bennett v. Smith, 21 Barb. 439; Rudd v. Rounds, 64 Vt. 452; Fratini v. Caslani, 66 Vt. 273. But the rank and condition of the defendant cannot be considered in assessing the damages. Bailey v. Bailey (Iowa, May, 1895), 63 N. W. Rep. 341. When two parties act together in producing such alienation, they are jointly liable therefor. Price v. Price, 91 Iowa, 693. Even a stranger is justified in giving shelter to a wife who has left her husband. Pollock v. Pollock, 29 N. Y. Sup. 37; Bennett v. Smith, 21 Barb. 439. Since it is but natural that a child should apply to a parent for advice in times of distress, and that the parent should advise such child for its best interests, a parent cannot be held responsible therefor, though it may conduce to conjugal alienation, if such advice was given in good faith according to the information received, though such information subsequently proved to be unfounded. Bennett v. Smith, *supra*. In such matters, the law presumes that the parent acts for the best interests of the child, and no cause of action in such cases is stated against a parent, unless it is alleged that his action was malicious. Reed v. Reed, 6 Ind. App. 317; Pollock v. Pollock, 29 N. Y. Sup. 37; Bennett v. Smith, *supra*. Where a young couple had been living with the husband's parents, and the latter ordered the wife to leave, such conduct was not considered to sustain an action for alienating the husband's affections, since they were not bound to support the wife. Young v. Young, 8 Wash. 81.

*Impeaching a Witness.*—There is a large difference of opinion among the courts as to the latitude which should be allowed in attacking the character of a witness in the effort to impeach his testimony. On the one hand it is claimed that the jury should be fully informed as to his character in order to determine what weight should be given to his testimony. On the other hand it is said, that such testimony will introduce other issues, when in turn such character is defended, that parties will be deferred from testifying, and that a bad moral character may exist with scrupulous veracity, which is all that is asked for from a witness. A compilation of the rulings may be found in 30 Cent. L. J. 241. Many courts confine the examination to the character of the witness for truth and veracity. In such courts, evidence, that the witness is a thief or a confidence man, or a prostitute is excluded. Conway v. State, 33 Tex. Crim. 327; Stayton v. State, 32 Tex. Crim. 33. Other courts allow evidence to be introduced of the bad general moral character of the witness. Rhea v. State, 100 Ala. 119; Ward v. State, 28 Ala. 53; Holland v. Barnes, 53 Ala. 83; People v. Harrison, 93 Mich. 594. Here specific acts of immorality cannot be proved (State v. Jackson, 44 La. Ann. 160; Holland v. Barnes, 33 Ala. 83; Blough v. Parry [Ind. March, 1895], 40 N. E. Rep. 70); nor is it competent to restrict the inquiry to the reputation of the witness for honesty (Davenport v. State, 85 Ala. 336); nor can a special vice, as a want of chastity, be singled out and made a special ground of impeachment. Spicer v. State, 105 Ala. 123; Rhea v. State, 100 Ala. 119; People v. Mills, 94 Mich. 630. Where an examination as to the bad general character of the witness is allowed, it is not deemed necessary to show that his character for truth and veracity is bad. Yarbrough v. State, 105 Ala. 43; Mitchell v. State, 94 Ala. 68; State v. Jackson, 44 La. Ann. 160. Other courts have allowed the examination to be extended to particular matters, as sobriety and chastity (State v. Shroyer, 104 Mo. 441); but an inquiry as to the general character of the witness as a law-abiding orderly man was not allowed. State v. Ragsdale, 39 Mo. App. 590. The Supreme Court of Missouri at first thought, that only the evidence of females should be impeachable for lack of chastity, then they extended it to males, and have now returned to the earlier ruling. State v. Sibley (Dec., 1895), 33 S. W. Rep. 167. Of course these rulings are based upon the individual ideas of the judges regarding human nature. An old doctor once told the writer, that a woman could not be guilty of a breach of chastity without a great shock to her moral nature, but that with man it was different. Such a belief may account for the distinction these judges have made in this matter.

S. S. MERRILL.

## JETSAM AND FLOTSAM.

### ACCESSION.

It is held in Powers v. Tilley, 87 Maine, 34, 47 Am. St. Rep. 304, that the owner of trees cut from his land by a willful trespasser, and by him manufactured into railroad ties, and sold to an innocent purchaser, may recover from the latter their value as ties, without any allowance for the increased value put upon the timber by the trespasser. This is the precise doctrine of Strubbee v. Trustees Cincinnati Railway, 78 Ky. 481, 39 Am. Rep. 251; Heard v. James, 49 Miss. 236; Gaskins v. Davis, 115 N. C. 85, 44 Am. St. Rep. 439; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280. But in Omaha, etc. Co. v. Tabor, 13 Colo. 41, 5 L. R. A. 236, it was held that in trover for such conversion of ore, sold to a third person, the measure of damages is the value when first severed, less cost of raising and hauling to defendant.

It has sometimes been held that where the trespass was involuntary and under mistake, the owner should recover only his actual loss, and not the increased value bestowed by the trespassers, except that in coal cases sometimes the cost of digging is allowed to defendant. Beede v. Lamprey, 64 N. H. 510, 10 Am. St. Rep. 426. "The weight of authority, it must be conceded, sustains the rule that where the action is brought for damages for logs cut and removed in the honest belief on the part of the purchaser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden v. Johnson, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; Herdic v. Young, 55 Pa. St. 176, 93 Am. Dec. 739; Hill v. Canfield, 56 Pa. St. 454; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 139; Cushing v. Longfellow, 36 Me. 306; Goller v. Fett, 30 Cal. 482; Foot v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Railway Co. v. Hutchins, 39 Ohio St. 571, 30 Am. Rep. 629;" Gaskins v. Davis, 115 N. C. 85, 44 Am. St. Rep. 439, and notes, p. 444, 5 L. R. A. 813. To same effect: Ross v. Scott, 15 Lea, 479; Forsyth v. Wells, 41 Pa. St. 291, 80 Am. Dec. 617; Coal Creek M. Co. v. Moses, 15 Lea, 300, 54 Am. Rep. 415; Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525; Blaen Avon C. Co. v. McCulloh, 59 Md. 403, 43 Am. Rep. 560; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280; Waters v. Stevenson, 13 Nev. 157, 29 Am. Rep. 293; Austin v. Huntsville Coal & M

Co., 72 Mo. 535, 37 Am. Rep. 446. But this has been denied. Isle Royal Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520; Hazelton v. Week, 49 Wis. 661, 36 Am. Rep. 796. And in Gaskins v. Davis, *supra*, it was held that the increased value added by the drawing of logs to mill belongs to the owner. In Woodenware Co. v. United States, 106 U. S. 432, the rule is stated to be that if the trespass was willful the trespasser is liable for the value at time of demand or suit, but if not willful, the trespasser or an innocent purchaser from him is entitled to a deduction for the increased value which either has bestowed upon the property; if the defendant is an innocent purchaser from a willful trespasser he is not entitled to any deduction therefor.—*The Green Bag.*

## CORRESPONDENCE.

### ADMISSION OF TESTIMONY FROM A FORMER TRIAL.

*To the Editor of the Central Law Journal:*

The article written by Mr. George Kroncke, in the issue of the 17th inst., on "The Admission of Testimony From a Former Trial When the Witness is Absent," does not cite Mattox v. United States, 156 U. S. 237, decided February 4th, 1895. In that case it was held by a divided court that when a person, accused of the crime of murder, is tried in a district court of the United States, and so convicted, and the conviction is set aside by the supreme court and a new trial ordered, a properly verified copy of the reporter's stenographic notes of the testimony of a witness for the government at the former trial, who was then fully examined and cross-examined, and who died after the first trial and before the second, may be admitted in evidence against the accused on the second trial. The opposing opinions of Mr. Justice Browne and Mr. Justice Shiras show that there is much to be said on each side of the question, and that it may still be considered an unsettled one. Very truly yours,

Washington, D. C. L. T. M.

### RIGHTS OF INFANTS IN INDIANA.

*To the Editor of the Central Law Journal:*

In 1864 A died, leaving widow and one child. Soon thereafter his real estate was disposed of, in the conveyance of which, by warranty deed, his widow joined. Subsequently the property has passed through different hands, during all of which time the infant child has never been mentioned. The property is pretty much in the same condition now as when A died, excepting some improvements. The child (heiress) married when 19 years of age, and she is now 32 years of age. Now, is she a tenant in common with the present owners of the property? And if so, when will she be barred by statutes of limitation from instituting partition proceedings? Can adverse possession be asserted against an infant, even though the infant had a guardian? Will you please give reference to Indiana decisions on these points, for which I shall feel under obligations. P. A.

### ANSWER TO QUESTION OF DEVISE.

*To the Editor of the Central Law Journal:*

In answer to the question of J. A. S., published in Vol. 42, p. 484, of your JOURNAL, I would say that the rule seems well-settled that the language used in the devise in question gives a *futail*. See 2d Bouvier's Law Dictionary, p. 521—"Shelley's Case." The language used does not fall within the rule in Shelley's Case, but the language, "to their bodily heirs forever," and the further expression, "said land is not to be sold or incumbered during the minority of said grandchildren," shows very clearly that the testator intended to vest the fee-simple title to the land in said grandchildren, and it thus appearing from the face of the will that such was the intention of the devisor, that intention controls the case, and a fee vests. See Korf v. Gericks, 44 N. E. Rep. 24, Indiana Supreme Court. Without citing authorities, it may be safely stated that in the absence of anything in a will contravening the general rule, an estate vests in devisees immediately upon the death of the testator, and the right to the rents from that time would seem to follow.

Lawrenceburgh, Ind. W. H. B.

## HUMORS OF THE LAW.

Judge—Have you anything to say before sentence is pronounced against you?

Convicted Burglar—The only thing I'm grumblin' about is bein' identified by a man as kept 'is 'ead under the bedclothes the whole time. That's wrong.

"Why do you wish to be excused?" asked the judge of the unwilling juror. "I'm deaf, your honor; so deaf I really don't believe I could possibly hear more than one side of the case."—*Harper's Bazaar.*

Getting Justice—"All I demand for my client," shouted the attorney, in the voice of a man who paid for it, "is justice!"

"I am very sorry I can't accommodate you," replied the judge, "but the law won't allow me to give him more than fourteen years."—*Cincinnati Enquirer.*

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and o the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**



1. ABATEMENT AND REVIVAL—Death of Party.—Rev. St. 1895, arts. 3021-3026, provide that an action for death by wrongful act shall be for the sole benefit of the sur-

viving husband, wife, children and parents of deceased, and the sum recovered will not be liable for deceased's debts; that it may be brought by all of the parties entitled, or by any one or more of them for the benefit of all; that, in case suit has been brought, and defendant dies while it is pending, it may be revived and prosecuted to judgment against his executor or administrator; and that, if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate: Held, that a cause of action for death by wrongful act does not survive the death of the wrongdoer, where suit is not brought before his death, there being no statute expressly providing therefor.—JOHNSON v. FARMER, Tex., 35 S. W. Rep. 1062.

2. ALTERATION OF NOTE—Materiality.—When a note is given by a corporation, payable to the manager's wife, for money due him for salary, and for expenditures made in behalf of the company out of funds represented by him to have belonged in part to his wife, an alteration of the note so as to make it payable to the manager himself is a material one.—SNEED v. SABINAL MINING & MILLING CO., U. S. C. C. of App., 73 Fed. Rep. 925.

3. APPEAL—Final Judgment.—A judgment which recites that a defendant was cited, and made default, but makes no disposition of a cause of action alleged against him in the petition, is not a final judgment in the action, and an appeal therefrom will not lie.—STATE NAT. BANK OF VERNON v. WAXAHACHIE NAT. BANK, Tex., 35 S. W. Rep. 1083.

4. ARBITRATION—Powers.—Arbitrators, on disagreement, have no implied powers to appoint an umpire to make the decision, and therefore an award by an umpire so appointed is void.—ALLEN-BRADLEY CO. v. ANDERSON & NELSON DISTILLERIES CO., Ky., 35 S. W. Rep. 1123.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for the benefit of two creditors of all of the assets of an insolvent partnership, amounting to more than double such creditors' claims, will be treated as an assignment for the benefit of all the creditors, the preferences being void.—FOX v. CURTIS, Penn., 34 Atl. Rep. 952.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A mortgage given by a merchant of his entire stock in trade to secure a pre-existing debt may be enforced by a creditor of the insolvent as a general assignment for benefit of creditors.—FAIRFIELD PACKING CO. v. KENTUCKY JEANS CLOTHING CO., Ala., 20 South. Rep. 63.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Estoppel.—Where appellee submits his case on the facts contained in appellant's abstract, the court will not consider any matter in the record not contained in the abstract. One who, with knowledge of the facts, accepted a *pro rata* share under a general assignment for the benefit of creditors, cannot thereafter attack the assignment for fraud.—ADLER v. BELL, Ala., 20 South. Rep. 83.

8. ATTORNEY AND CLIENT—Attachment.—Defendants contracted to pay plaintiffs for their services as attorneys in an action brought by the defendants against a street railway company 40 per cent. of the amount recovered. Defendants afterwards settled with the street railway company, and refused to pay plaintiffs the percentage agreed upon: Held, that plaintiffs' claim for services became due absolutely upon the settlement, and an attachment would lie to enforce it.—BOGERT v. ADAMS, Colo., 45 Pac. Rep. 235.

9. BANKS AND BANKING—Collections.—Plaintiff delivered to a bank for collection a draft received by him from a lottery company, in payment of prizes drawn by tickets owned jointly by him, M and five other persons. The agreement between plaintiff and the bank was that it should pay to plaintiff, when the draft was collected, three-sevenths of the proceeds, which included M's share of one-seventh. Plaintiff did not agree to accept such share for M, or recognize M's right to any part of the fund; and he told M he would have to get his share by law, if at all: Held, that the bank was under no obligation to pay M any part of the money collected on the draft.—ROSELLE v. MCAULIFFE, Mo., 35 S. W. Rep. 1135.

10. BENEVOLENT SOCIETY—Beneficiaries.—Where, by fraud, one procures his substitution as beneficiary in a benefit certificate, an action for the fraud will not lie against him by the original beneficiary.—HOEFT v. SUPREME LODGE KNIGHTS OF HONOR, Cal., 45 Pac. Rep. 185.

11. CARRIERS—Passenger—Contributory Negligence.—A person riding on the bumper on the rear of a street car, without the knowledge of the conductor, is, as a matter of law, guilty of contributory negligence, so as to prevent a recovery for injuries occasioned by the car upon which he was riding being struck from the rear by another car.—BARD v. PENNSYLVANIA TRACTION CO., Penn., 34 Atl. Rep. 953.

12. CARRIERS OF PASSENGERS—Contract of Carriage. Defendant railroad, a Pennsylvania corporation, issued and delivered to plaintiff, in the State of New Jersey, a pass from Philadelphia to Elmira, N. Y., which provided that plaintiff assumed all risks of accident. Plaintiff was injured, within the State of Pennsylvania, by the admitted negligence of defendant's employees: Held, that the contract of carriage, since it was to be performed in Pennsylvania, was governed by the laws of that State, and not by the laws of the place where it was made.—BURNETT v. PENNSYLVANIA R. CO., Penn., 34 Atl. Rep. 972.

13. CARRIERS OF PASSENGERS—Loss of Baggage.—When a person takes passage upon a railroad, purchases his ticket and checks his baggage to the place of his destination, and such baggage arrives at its destination, and is not, from any cause, delivered to such passenger, it is the duty of the company to deposit the baggage in its baggage room, in which event its responsibility becomes that of warehouseman, and it must respond in damages for any neglect in that capacity.—KANSAS CITY, FT. S. & M. R. CO. v. PATTEN, Kan., 45 Pac. Rep. 108.

14. CONSTITUTIONAL LAW—Title of Act.—Laws 1895, ch. 64, authorizing the several courts of the State "to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses" theretofore triable on indictment only, embraces but a single subject, and is not in violation of Const. art. 3, § 21, which provides that "no law shall embrace more than one subject, which shall be expressed in the title."—STATE v. AYERS, S. Dak., 67 N. W. Rep. 611.

15. CONSTITUTIONAL LAW—Obligation of Contracts—Corporate Franchises.—An accepted act of incorporation of a private corporation is a contract between the State and the corporation, and any law of a State which destroys or impairs any valuable franchise granted by such an act violates § 10, art. 1, of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and is ineffective, unless the right so to destroy or impair the franchise is reserved by the State before or at the time the charter is granted.—PEARSALL v. GREAT NORTHERN RY. CO., U. S. C. C. (Minn.), 73 Fed. Rep. 933.

16. CONSTITUTIONAL LAW—Obligation of Contracts.—Act March 20, 1895, providing that the proceeds of life insurance policies shall be exempt from all liability for any debt, would be unconstitutional as impairing the obligation of contracts if applied to antecedent policies and antecedent debts, and is, therefore, not retroactive.—IN RE HEILBRON'S ESTATE, Wash., 45 Pac. Rep. 153.

17. CONSTITUTIONAL LAW—Quo Warranto Against Corporation.—Rev. St. 1895, art. 4343, in so far as it attempts to confer on district and county attorneys authority to institute proceedings in the name of the State against a private corporation exercising power not conferred by law, contravenes Const. art. 4, § 22,

authorizing the attorney-general to bring such proceedings.—STATE v. INTERNATIONAL & G. N. R. CO., Tex., 35 S. W. Rep. 1067.

18. CONTRACT — Liquidated Damages.—Defendants took plaintiff, who had theretofore been their clerk, into partnership. Plaintiff, who had been addicted to the excessive use of intoxicating liquor, but who had reformed, again became intoxicated, whereupon the parties entered into an agreement which provided that, if he should again use liquor to excess, he should forfeit to plaintiffs all interest in the partnership and in the profits, and should instead be paid a certain salary for his services: Held, that the forfeiture of plaintiff's interest in the partnership in case of his becoming intoxicated would be enforced as liquidated damages.—HENDERSON v. MURPHREE, Ala., 20 South. Rep. 45.

19. CONTRACT—Validity.—In an action against a bank for the proceeds of a draft, in which an interplea was filed, it appeared that plaintiff, interpleader, and several holders of lottery tickets agreed to hold them jointly, and divide their winnings equally; that plaintiff, holder of a successful ticket, forwarded it, with other successful tickets turned over to him, to the lottery company, and received a single draft, payable to himself, for all the money won; that the bank accepted it for collection only, agreeing with plaintiff, interpleader, and another holder to pay the proceeds in specified portions to themselves and one other ticket holder: Held, that the agreement with the bank was valid, though the transaction in which the draft was obtained was illegal, and the bank, under the agreement, liable to interpleader for the part of the proceeds assigned by it to him.—ROSELLEE v. BECKEMEIR, Mo., 35 S. W. Rep. 1132.

20. CONTRACTS FOR SALE OF LAND.—A contract for the sale of land provided that the vendee should, on conveyance by the vendor, execute his notes in payment, due in one, two and three years: Held, that an action by the vendor for breach of the contract on the part of the vendee, the complaint alleging a performance on the part of the vendor, in which the amount of the first installment note was recovered, was a bar to a second action on the contract to recover the subsequent installments after they became due.—COOKE v. COOK, Ala., 20 South. Rep. 64.

21. CONTRACT OF REGENTS OF STATE. — Where one plants trees on the grounds of the State agricultural college under a contract with the board of regents which it was not authorized to make, and no subsequent ratification is shown, the State is liable only for the reasonable value of the trees.—JEWELL NURSERY CO. v. STATE, S. Dak., 67 N. W. Rep. 629.

22. CONVERSION—Evidence—Demand.—Refusal to restore goods on demand is only evidence of conversion, and, whenever the conversion can be otherwise proved, it is not necessary for the plaintiff to allege or prove a demand and refusal.—ADAMS v. CASTLE, Minn., 67 N. W. Rep. 637.

23. CORPORATIONS—Ultra Vires—Estoppel.—A bank which causes property owned by it to be conveyed by a deed regular in form to a worthless corporation, organized by its own directors, and then loans such corporation money, takes its notes, and discounts them with strangers, by representing them as prime paper and on the strength of such corporation's apparent ownership of such property, is thereafter estopped, as against the holders of the notes, to assert that the conveyance was *ultra vires*.—BUTLER v. COCKRILL, U. S. C. C. of App., 73 Fed. Rep. 946.

24. CORPORATION—Joint Stock Company—Subscriptions.—Where one has subscribed money under an agreement to form a joint-stock company or partnership, if the subscriptions reach a stated amount, he is not bound thereby if a majority of the subscribers organize as a corporation.—KNOTTSVILLE ROLLER MILL CO. v. MATTINGLY, Ky., 35 S. W. Rep. 1114.

25. CORPORATIONS—Manufacturing—Stock—Payment in Property.—A corporation, unless prohibited by some constitutional or statutory provision, may, in good faith, issue paid shares of its stock for the purchase of property at a fair valuation; and in such case both the corporation and its creditors will be bound thereby. But if there is a material overvaluation of the property, to the knowledge of the contracting parties, the transaction is fraudulent as to subsequent creditors of the corporation without notice; and, if it becomes insolvent, the shareholders so paying for their stock will be charged in favor of such creditors with the difference between the real value of the property and the par value of their stock.—HASTINGS MALTING CO. v. IRON RANGE BREWING CO., Minn., 67 N. W. Rep. 652.

26. CORPORATION — Stockholders — Acquiescence in Corporate Acts.—When an act done by the directors of a corporation is in fact unauthorized, but was done with the *bona fide* intention of benefiting the corporation, a shareholder, knowing thereof, who does not dissent within a reasonable time, will be presumed to have assented to the act, if his failure to dissent is unexplained. — PINKUS v. MINNEAPOLIS LINEN MILLS, Minn., 67 N. W. Rep. 643.

27. CORPORATIONS—Stockholders—Action to Enforce Liability.—Where a plaintiff obtains judgment against an insolvent corporation, whose stockholders have not paid their subscriptions to stock, and the complaint alleges the return of an execution *nulla bona* by a sheriff of the county other than where such defendant resides or has property, such return, of itself, is not sufficient allegation of insolvency of the corporation to justify proceedings in equity against stockholders of the corporation who have not paid their subscription to stock.—SALT LAKE HARDWARE CO. v. TINTIC MILLING CO., Utah, 45 Pac. Rep. 200.

28. COSTS—Criminal Cases.—A prosecution by a city for keeping a tippling shop in violation of a city ordinance, brought to the supreme court by writ of error, is, as affects the question of taxation of costs, to be considered a criminal case. — CITY OF YANKTON v. DOUGLASS, S. Dak., 67 N. W. Rep. 630.

29. COUNTIES—Validity of Contract.—A county contracted for the construction of waterworks in a town, agreeing, in consideration therefor, to pay the contractor a certain sum, and to grant him an exclusive right of way to lay piping for supplying said town with water: Held that, the grant of the exclusive right of way being unlawful, under Const. art. 1, § 26, providing that perpetuities and monopolies shall never be allowed, the contract was void.—EDWARDS COUNTY v. JENNINGS, Tex., 35 S. W. Rep. 1053.

30. CREDITORS' BILL—Right to Maintain.—A simple contract creditor may file a bill in equity to reach and subject assets of his insolvent debtor which have either been fraudulently conveyed, or in respect to which a suit has been commenced, or a decree or judgment suffered, with intent to hinder, delay, and defraud creditors, and which action has that effect.—ALABAMA IRON & STEEL CO. v. MCKEEVER, Ala., 20 South. Rep. 84.

31. CRIMINAL LAW—Homicide—Insanity.—Where the plea of insanity is interposed on a trial for murder, the burden is on defendant to prove his insanity at the time of the killing, though the evidence shows that he was, at a time prior thereto, insane.—STATE v. WRIGHT, Mo., 35 S. W. Rep. 1145.

32. CRIMINAL LAW—Homicide—Self-defense.—A person on his own premises, outside his dwelling house, is not obliged to retreat, or consider whether he can do so safely if attacked by another with a deadly weapon.—STATE v. CUSHING, Wash., 45 Pac. Rep. 145.

33. CRIMINAL PRACTICE—Scandalous Matter.—A complaint for vagrancy, which was otherwise sufficient, should not have been dismissed on the ground that it contained scandalous matter, in that it also charged defendant with "being a first-class pimp." The court, of its own motion, should have stricken out the objectionable words, and rebuked the persons who used

them, or permitted them to be used.—CITY OF BUTTE V. PEASLEY, Mont., 45 Pac. Rep. 210.

34. DEATH BY WRONGFUL ACT—Action by Administratrix.—The plaintiff, an administratrix appointed under the statute of New Jersey, sues to recover damages for the death of her intestate, who died of injuries caused by the wrongful negligence of the defendant in Pennsylvania, the statute of which State gives, in such cases, the right of action to the widow of the deceased: Held, on demurrer, that this action cannot be maintained by the administratrix.—LOWER V. SEGAL, N. J., 34 Atl. Rep. 945.

35. DEATH BY WRONGFUL ACT—Action by Widow.—Rev. St. Ariz. 1887, tit. 36, §§ 2145, 2155, providing that an action for wrongful death may be brought, for the benefit of the husband, wife, children, and parents of deceased, by one of them for the benefit of all, and that the jury shall divide the recovery among the persons entitled to the benefit of the action, does not authorize one of such persons, suing for the benefit of all, to remit damages allotted to some of the persons entitled, so as to reduce to nominal damages the sums awarded to them, and defendant may complain of such *remittitur*.—SOUTHERN PAC. CO. V. TOMLINSON, U. S. S. C., 16 S. C. Rep. 1171.

36. DEED — Estoppel. — Where the purpose of the grantor as expressed in his deed is to convey the land itself, and not merely his right, title, and interest therein, and the grant is followed by a covenant of general warranty "against the lawful claim or claims of all persons whomsoever," such grantor, his heirs and assigns, are estopped from asserting an after-acquired title against the grantee, his heirs and assigns, although the deed does not, in so many words, purport to convey to the grantee "an indefeasible estate in fee-simple absolute."—ARMSTRONG V. PORTSMOUTH BLDG. CO., Kan., 45 Pac. Rep. 67.

37. DEED — Record—Notice.—A deed conveyed "all the lands in the State of M which my former husband, H S, owned, and which he devised to me in his last will and testament; excepting, however, out of said grant, those certain tracts of land which, from time to time, have been conveyed by deed, either by Mr. S or myself, and which are of record, and none other:" Held, that the grantee took subject to an unrecorded deed, executed by his grantor, of which he had actual notice.—HENDERSON V. CAMERON, Miss., 20 South. Rep. 2.

38. DESCENT—Rights of Heirs.—The next of kin of an intestate may, without appointment of an administrator, where it is affirmatively shown that there are no debts of the estate—maintain an action to recover the share of their decedent as a distributee of another estate.—HURT V. FISHER, Tenn., 35 S. W. Rep. 1085.

39. ELECTION OF REMEDIES—Rescission of Contract.—A vendee who has been induced by the fraud of his vendor to make a contract of purchase, which contains warranties made by the vendor, has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, recover the damages he has sustained for the fraud, and also those resulting from a breach of the warranties of the vendor, but he cannot do both.—WILSON V. NEW UNITED STATES CATTLE RANCH CO., U. S. C. C. of App., 73 Fed. Rep. 994.

40. EQUITY — Specific Performance.—Equity will not decree specific performance of a contract, where there is an adequate remedy by action at law for breach of the contract.—YOUNG LOCK NUT CO. V. BROWNLEY MANUF'G CO., N. J., 34 Atl. Rep. 947.

41. EXTRADITION — Waiver — Surrender.—A person against whom a warrant has been issued by a magistrate of the State, and who is outside of the limits of the State, may waive the issuance of extradition papers, and voluntarily surrender himself to the jurisdiction of the courts of the State.—STATE V. GARRETT, Kan., 45 Pac. Rep. 93.

42. FRAUDS, STATUTE OF—Contract.—A contract for the renting of land for the term of one year, to commence in the future, is "an agreement not to be performed within one year from the making thereof," which is required to be in writing by Code, § 1721, subd. 1; and such a contract, resting in parol, will not support an action to recover the rent, although payable within the year, the promise to pay and the consideration therefor not being severable.—RAIN V. MCDONALD, Ala., 20 South. Rep. 77.

43. FRAUDULENT CONVEYANCES.—A creditor may take any number of securities, if the debtor be not insolvent, or even if insolvent, provided the securities be not so excessive as to indicate a purpose to shield the property from other creditors.—HENDON V. MORRIS, Ala., 20 South. Rep. 27.

44. FRAUDULENT CONVEYANCES — Subsequent Creditors.—A conveyance of property, though voluntary, cannot be attacked by a subsequent creditor of the grantor without proof of actual fraud in the transaction, and the insolvency of the grantor at the time will not raise a presumption of such fraud without a showing that indebtedness then existing is still unpaid.—ELYTON LAND CO. V. IRON CITY STEAM BOTTLING WORKS, Ala., 20 South. Rep. 51.

45. FEDERAL COURTS — State as a Party.—A federal court has no jurisdiction, on the ground of citizenship, of a suit brought by a State against either its own citizens or citizens of other States.—STATE OF MINNESOTA V. GUARANTY TRUST & SAFE-DEPOSIT CO., U. S. C. C. (Minn.), 73 Fed. Rep. 914.

46. GARNISHMENT — Pleading.—A complaint in garnishment showed the rendition of the original judgment, the issuance of the execution, the levy by garnishment, and the refusal of the garnishees to apply the funds. The answer of the garnishees was, in effect, that they held certain funds of the judgment debtor, but did not know whether they belonged to him personally, or as a representative. The complaint positively averred that the money belonged to him individually: Held, that the answer stated no defense, and that judgment was properly entered for plaintiff on the pleading.—SWEENEY V. SCHLESSINGER, Mont., 45 Pac. Rep. 213.

47. GIFT—Parol Gift of Land.—Equity protects and enforces a parol gift equally with a parol contract of the sale of land, where possession is taken in pursuance of the gift, improvements made, and the donee changes his situation or condition upon the faith of the gift.—FLANIGAN V. WATERS, Kan., 45 Pac. Rep. 88.

48. HIGHWAY — Damages.—The measure of damages to abutting property from the grading of a highway, when done by private landowners along the route, by authority and under supervision of the county, is the same as where the grading is done by the county.—GROVER V. CORNET, Mo., 35 S. W. Rep. 1143.

49. HIGHWAY — Dedication.—Where a road runs across private property, and is used by the public as a common road without interruption for 50 years, the owner acquiescing in such use, a dedication of the ground on which the road runs to the use of the public for such purpose will be presumed.—WOOLARD V. CLYMER, Tenn., 35 S. W. Rep. 1086.

50. HOMESTEAD — Mortgage by Husband.—Under Act March 18, 1887, providing that the conveyance of a homestead must be executed and acknowledged by both the husband and the wife, a mortgage on a homestead in which the wife, acknowledges merely the relinquishment of her rights of dower is invalid.—SHATTUCK V. BYFORD, Ark., 35 S. W. Rep. 1107.

51. HUSBAND AND WIFE—Right to Wife's Lands.—Defendant's wife, at the time of marriage, owned an undivided interest in land. Upon partition, the land was sold, and was bought by defendant, who gave his wife a note for her interest: Held, that the giving of the note would not be deemed a waiver of defendant's marital rights in the land, in the absence of any clear

indication of an intention to waive the same.—HACKETT v. MOXLEY, Vt., 34 Atl. Rep. 949.

53. INSURANCE — Description of Property.—In an action upon a fire policy, in which the property insured was described as a frame building and additions used as a dwelling and a greenhouse, it appeared that the building destroyed was used exclusively as a dwelling, the greenhouse proper not being attached thereto, but that it was the intention of the owner and of the agent who issued the policy to insure that particular building: Held, that the question whether the property destroyed was covered by the policy was for the jury.—HOLTER LUMBER CO. v. FIREMAN'S FUND INS. CO., Mont., 45 Pac. Rep. 207.

54. INSURANCE — Iron Safe Clause.—Where it was the custom of the insured to enter the credit sales each day upon a blotter, the entries being afterwards transferred to the regular books of account, the failure to produce a record of the credit sales of the day before the fire, because of the destruction of the blotter, which was not placed in the safe at night, is not a violation of the condition in a fire insurance policy providing that the insured shall keep a set a books, showing the cash and credit sales, in a fireproof safe, and that failure to produce such books shall avoid the policy.—BROWN v. PALATINE INS. CO., Tex., 35 S. W. Rep. 1060.

54. INTOXICATING LIQUOR — Sale.—In a prosecution for an illegal sale of intoxicating liquor, it is error for the court to instruct the jury that evidence of other unlawful sales may be considered, without restriction, to determine whether the defendant is guilty of making the sale on which the State elects to rely for a conviction.—STATE v. HUGHES, Kan., 45 Pac. Rep. 94.

55. JUDGMENT—Revival — Scire Facias.—It is proper to render judgment of "*fiat executio*" on the return of "Nihil" to two successive writs of *scire facias* on the original judgment. After the original owner of a judgment had been declared a bankrupt, his executrix revived the judgment by *scire facias* proceedings: Held that, the assignee in bankruptcy having ratified the action of the executrix, by making himself a party to the proceedings and procuring a decree compelling the transfer of the judgment to him, the judgment defendant could not complain that the executrix had no power to revive the judgment.—BROWN v. WYGANT, U. S. S. C., 16 S. C. Rep. 1159.

56. LANDLORD AND TENANT — Forfeiture of Lease.—Where a lease provides that the leased premises shall be used only as a dwelling and boarding and lodging house, and shall not be sublet, and also contains a provision that the lease shall be void if the tenant fails to perform on his part, a justice of the peace has no jurisdiction to remove the tenant by summary proceedings for an alleged breach of said conditions.—STATE v. SINCLAIR, N. J., 34 Atl. Rep. 943.

57. LANDLORD AND TENANT — Possession by Mortgagees of Goods.—Where mortgagees of a stock of goods in a leased store building take possession of the stock, and continue to occupy the building for the purpose of sale, they are bound by the promise of their attorney to the landlord to pay the rent after they took possession.—HATCH v. VAN DERVOORT, N. J., 34 Atl. Rep. 988.

58. LANDLORD AND TENANT — Lease.—Where a lessee for a term of years sells the remainder of his term, puts the vendee in possession, and tells his lessor that thereafter, he must look to the vendee for his rent, and thereupon the lessor cancels the lease, and executes a new one to such vendee, there is a complete surrender of the original lease by the lessee.—MORGAN v. MCCOLLISTER, Ala., 20 South. Rep. 54.

59. LIMITATIONS—Non-resident.—Where a debtor, before limitations have run against his debt, removes from the State, periods of time which he subsequently spends in the State as a salesman, traveling from place to place, and remaining only a few days in each place, cannot be included, to complete the period of limitations.—WEILLE v. LEVY, Miss., 20 South. Rep. 3.

60. LIMITATIONS—Running of Statute.—Where a husband sold a flock of sheep belonging to his wife without her knowledge, the statute began to run against her, in favor of the purchaser, at the time of the sale, and not at the time of her discovery of the sale.—GORE v. MURPHY, Mont., 45 Pac. Rep. 217.

61. MASTER AND SERVANT — Fellow-servants.—The foreman of a small extra gang of about six men, engaged in repairing defendant's railway track, is the fellow-servant of the laborers in the gang, though they are under his orders, and he has power to employ and discharge them.—GOODWELL v. MONTANA CENT. RY. CO., Mont., 45 Pac. Rep. 210.

62. MASTER AND SERVANT — Fellow-servants.—Where a firm of general contractors had taken a contract to grade a street, and had two gangs of laborers at work thereon, each under the charge of a foreman having no control over the other, but having power to hire and discharge his own men and control their operations, held, that the foreman of one gang was a fellow-servant of the laborers under him, so that the master was not liable for an injury caused to one of them by his negligence.—BALCH v. HAAS, U. S. C. C. of App., 73 Fed. Rep. 974.

63. MASTER AND SERVANT—Fellow-servants.—A foreman of a railroad bridge gang, who is a subordinate of the superintendent of bridges, but has authority to hire and discharge the men under him, and sole power to direct and control them in their work, is their fellow-servant, with respect to injuries caused to one of them by his negligence in adopting and pursuing a dangerous method of doing a given piece of work, such as throwing down a railway transfer shed, and the company is not liable therefor.—CLEVELAND, C., C. & ST. L. RY. CO. v. BROWN, U. S. C. C. of App., 73 Fed. Rep. 970.

64. MASTER AND SERVANT—Negligence—Knowledge of Incompetency.—An employer is liable for injury to an employee, caused by the incompetency of a co-employee whom the employer, with knowledge of his incompetency, retains in his service, if such incompetency was not known to the person injured.—TEXAS & P. RY. CO. v. JOHNSON, Tex., 35 S. W. Rep. 1042.

65. MECHANICS' LIENS—Attachment to Land.—Const. art. 16, § 37, declaring that mechanics and material-men shall have a lien upon the buildings made by them for the value of their labor done thereon or material furnished therefor, and that the legislature shall provide for the enforcement of said liens, gives a lien upon the interest that the person causing such building to be made thereon has in the land, to the extent that it is necessary to the enjoyment of the building, or that it may be set apart to be used in connection therewith.—STRANG v. PRAY, Tex., 35 S. W. Rep. 1054.

66. MECHANICS' LIENS—Priority.—The owner of two lots subject to the lien of five judgments, having induced the holders of the last four judgments to release one of the lots, which was unoccupied, erected houses thereon, and mechanics' liens were subsequently filed against such houses and the lot on which they were built. The owner afterwards assigned for the benefit of creditors, and both lots were sold by the assignee: Held, that the mechanic's lien claimants had an equitable interest in the proceeds of the lot on which the new buildings were erected, which was superior to that of the judgment creditors who had released their liens.—IN RE BITNER'S ESTATE, Penn., 34 Atl. Rep. 957.

67. MORTGAGE.—Code 1886, § 1868, imposing a penalty on a mortgagee, or the transferee of a debt secured by a mortgage, which is of record, for a failure to enter partial payments on the record, at the request of the mortgagor or his grantee, judgment creditor or lienholder, is constitutional.—GAY v. ROGERS, Ala., 20 South. Rep. 37.

68. MORTGAGES—Foreclosure.—A mortgage on land upon which is situated a gin mill, purchased by the grantor on conditional sale, does not secure a purchase money note given for the mill, and paid by the

mortgagee at the mortgagor's request.—BUTLER v. ADLER-GOLDMAN COMMISSION CO., Ark., 35 S. W. Rep. 1110.

69. MORTGAGE—Foreclosure.—A second mortgagee, holding the legal title, but as a mortgagee only, who, at the request of the debtor, conveyed a portion of the premises, thus releasing his lien thereon, to one having knowledge of the facts, is entitled to have such portion first sold under a foreclosure of the first mortgage.—STULB v. AINSLIE, Wash., 45 Pac. Rep. 157.

70. MORTGAGES—Estoppel.—A corporation which accepted a conveyance of a water-works plant by a deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, held estopped thereby from questioning the validity of the mortgages.—AMERICAN WATER-WORKS CO. OF ILLINOIS v. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., 73 Fed. Rep. 956.

71. MORTGAGES—Parol Agreement.—A parol agreement between the parties, by which a first mortgagee agrees to hold his mortgage subject to a mortgage to secure the loan to the mortgagor to enable him to build on the land, is not within the statute of frauds.—LOEWEN v. FORSEE, Mo., 35 S. W. Rep. 1138.

72. MUNICIPAL BONDS—Innocent Purchasers—Recitals.—Recitals in county bonds, that they are "issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law," and under the provisions of certain statutes, and that they are in part payment of "a subscription to the capital stock" of a named railroad company, estop the county, as against an innocent purchaser, from showing that the bonds are void, because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock.—WESSON v. SALINE COUNTY, U. S. C. C. of App., 73 Fed. Rep. 917.

73. MUNICIPAL CORPORATIONS—City Warrants—Taxation.—Interest upon city warrants drawn on the general fund cannot be compounded. Where a city has already levied a tax to the limit allowed by law, the proceeds of which have been used for the necessary city expenses, it will not be compelled to levy a special tax to pay outstanding city warrants.—PORTLAND SAV. BANK v. CITY OF MONTESANO, Wash., 45 Pac. Rep. 158.

74. MUNICIPAL CORPORATIONS—Control Over Sidewalks.—Cities of the third class have power to open and improve streets, avenues and alleys, and make sidewalks, build bridges, culverts and sewers within the city; and where the mayor and council have determined by ordinance that a new sidewalk is necessary, and by ordinance provide for the removal of the old walk and the building of a new one, designating the material, and providing the dimensions of the walk, their determination is final, and no action will lie by an abutting property owner to enjoin the construction of such walks, when the ordinance is not unreasonable or unjust in its provisions.—STEWART v. CITY OF NEODESHA, Kan., 45 Pac. Rep. 110.

75. MUNICIPAL CORPORATIONS—Defective Highways—Liability of Towns.—A statutory town is not liable in an action by a private person for injuries sustained by him while using its highways, which were caused either by its failure to repair or by direct acts of negligence of its officers in repairing the highway.—WELTSCH v. TOWN OF STARK, Minn., 67 N. W. Rep. 648.

76. MUNICIPAL CORPORATIONS—Powers of Mayor and Council.—The mayor and council of a city of the third class have the care, management and control of the city and its finances, and have power to enact such ordinances as they shall deem expedient for the good government of the city, the preservation of peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and make such rules and regulations as may be necessary to carry their power into effect, to open and improve streets, and make assessments upon the taxable property of the city to pay for the same, build sidewalks along the side streets, and make assessments upon abutting lots to pay for the same.—STATE v. CITY OF NEODESHA, Kan., 45 Pac. Rep. 122.

77. NEGLIGENCE — Imputed Negligence.—A young woman, while riding in a carriage, by invitation of the owner, driven by a driver sent by the owner, was injured on a public street in a city, by reason of the negligence of the city in allowing the street to be obstructed by broken stone used in repairing it, along a high embankment, whereby the carriage was overturned down the embankment, and her leg broken. The court charged the jury that if the driver had sole charge of the vehicle and the animal drawing it, and she had no control over either, the negligence of the driver, if he was negligent, could not be imputed to her, and would not bar her recovery: Held not erroneous.—CITY OF LEAVENWORTH v. HATCH, Kan., 45 Pac. Rep. 65.

78. NEGOTIABLE INSTRUMENT—Defenses—Mistake of Law.—That defendant signed note for money loaned to the corporation of which he was a director, under a belief that he would not be individually liable, is no defense.—MALEDON v. LEFLORE, Ark., 35 S. W. Rep. 1102.

79. NEGOTIABLE INSTRUMENT—Note—Consideration.—The payment of a matured note is not a sufficient consideration to support a promise by the payee to extend another note not yet due.—WOLZ v. PARKER, Mo., 35 S. W. Rep. 1149.

80. NEGOTIABLE INSTRUMENT—Note—Contract of Indorser.—A general indorser of a note, in effect, contracted in writing, as provided for in Comp. Laws, § 4479, subd. 4, that he would pay it on due notice of the dishonor of the instrument; and where no such notice was given, evidence of a purported oral promise on the part of the indorser that he would guaranty the amount thereof, in any event, in case of default by the maker, was incompetent, under § 3545, excluding evidence of oral agreements when the contract has once been put in writing.—SCHMITZ v. HAWKEYE GOLD MINING CO., S. Dak., 67 N. W. Rep. 618.

81. NEGOTIABLE INSTRUMENT—Note—Garnishment.—The maker of a note who, at the time of its maturity, has been garnished in attachment, then pending against the payee, cannot set up such garnishment as a defense to the action, nor to the recovery of costs and the attorney's fee provided for in the note.—GLEGERMOVICH v. ZICOVICH, Cal., 45 Pac. Rep. 174.

82. NEGOTIABLE INSTRUMENTS—Stipulations for Attorney's Fees.—Plaintiff brought action, aided by attachment, upon a note not due. The note stipulated that, if placed in the hands of an attorney for collection, the maker should pay all costs of collection, including a certain attorney's fee. The attachment was found to have been wrongfully sued out: Held, that the action having been begun before any default on the part of the maker of the note, he was not liable for the attorney's fee.—LANING v. IRON CITY NAT. BANK, Tex., 35 S. W. Rep. 1048.

83. NEGOTIABLE INSTRUMENTS—Sureties—Discharge.—A surety who signs a note, blank as to date, amount and payee, and intrusts it to the principal, who fills out the blanks, and for a larger sum than the surety understood was to be inserted, and then delivers it to the payee, who takes it without notice, will generally be held liable for the note as the payee took it.—EMERSON v. BLEVINS, Kan., 45 Pac. Rep. 63.

84. NUISANCE—Obstruction of Highway.—One who has contracted to haul dirt at a specified price per load may recover damages from a railroad corporation for thereafter erecting and maintaining a fence across a highway which was the natural route from the place where the dirt was taken to the place of delivery, and over which several loads could have been hauled in the time required to haul one load by the circuitous route which the contractor was compelled to take because of the obstruction.—KNOWLES v. PENNSYLVANIA R. CO., Penn., 34 Atl. Rep. 974.

85. OFFICE AND OFFICERS — Filling of Vacancy.—Const. art. 14, § 8, provides that "the State University

shall be under the control of a board of nine members appointed by the governor and confirmed by the senate, to be designated the 'Regents of Education.' They shall hold their office for six years, three retiring every second year:" Held that, there being no provision for their holding over, the term of a regent is absolutely fixed at six years, and at its expiration, unless his successor has been appointed, the office becomes vacant. —STATE v. SHELDON, S. Dak., 67 N. W. Rep. 613.

86. OFFICE AND OFFICERS—Impeachment—Rules of Law.—Impeachment proceedings in the supreme court under Const. art. 7, §§ 2, 3, providing for the removal by the supreme court of the judicial officers of certain courts for specified causes, are criminal in their nature, and are governed by the rules of law applicable to criminal cases.—STATE v. ROBINSON, Ala., 20 South. Rep. 30.

87. OFFICE AND OFFICERS—Term of Office.—A legislative enactment "that the term of the office of city collector in any city of the third class shall be three years" is plainly prospective, and does not enlarge the term of one elected before its passage.—STATE v. JOHNSON, N. J., 34 Atl. Rep. 929.

88. PARTITION — Community Estate.—The presumption that lots purchased by a husband and paid for during his second marriage were community estate of the second marriage is not overcome by evidence that, prior to his second marriage, he bought a factory with community money of the first marriage, for a sum about equal to the aggregate consideration of the lots, and that this factory was in his possession, and earned large profits, during the early part of his second marriage, but a few years later, and before the consideration for the lots was paid, was not in his possession.—ALBRECHT v. ALBRECHT, Tex., 35 S. W. Rep. 1076.

89. PARTNERSHIP—Assignment for Creditors.—An assignment of all the property of a partnership, composed of three partners, for the benefit of their creditors, made by two of the partners only, may be subsequently ratified, and made valid by the assent of the other partner.—CORBETT v. CANNON, Kan., 45 Pac. Rep. 80.

90. PLEADING—Breach of Warranty.—In an action to recover the value of certain horses, defendants claimed under purchase from K, whom they impleaded, praying that, in event plaintiff obtained judgment, they might have judgment against K for a like amount: Held, that defendants were entitled to recover from K, as actual damages, only the price that they paid for the horses, and the price should have been alleged, in order to entitle them to recover under the cross complaint.—HUDSON v. NORWOOD, Tex., 35 S. W. Rep. 1075.

91. PLEADING—Joinder of Causes of Action.—Defendant agreed with plaintiff "to remodel and change the ice machine" used by plaintiff, for a specified sum, and guarantied that it would make seven tons per day: Held, that plaintiff in *assumpsit* could unite in different counts the common counts and a special count for breach of contract.—YORK MANUFACTURING CO. v. BESSEMER ICE MANUFACTURING & STORAGE CO., Ala., 20 South. Rep. 13.

92. PLEADINGS—Cross Bill.—In trespass to try title, where defendant, by cross bill or plea in reconvention, seeks affirmative relief, and the allegations of the cross bill show a cause of action against plaintiff with reference to the subject-matter of the suit, plaintiff cannot, by dismissing his bill, defeat defendant's right to a trial on the cross bill.—SHORT v. HEPBURN, Tex., 35 S. W. Rep. 1056.

93. PLEDGE.—The owner of a stock of goods, mortgaged for $3,000, agreed with the mortgagees that, to secure payment of said debt, and enable them more readily to procure its payment, such owner pledged and delivered the goods to the mortgagees, to hold in trust, and not otherwise, "with privilege to sell and dispose of the same, and out of the proceeds of said property, after deducting the sum of $3,000 so owing, as aforesaid, to return and deliver to the 'owner' the surplus of such sale of such property:" Held, that there was a transfer of title to, and not a mere pledge of, the goods to the mortgagees.—SENSEN v. BOWLES, S. Dak., 67 N. W. Rep. 627.

94. PRINCIPAL AND SURETY—Extension of Time.—A purchaser of real estate, holding a bond for title, who by a transfer of the bond, becomes, in effect, a surety for the payment of the notes given for purchase money, is not released from liability thereon by the making of a new contract between the vendor and the second purchaser extending the time of payment, when such contract provides that it shall not affect the original notes, nor operate to extend them, except at the election of the maker.—HODGES v. ELYTON LAND CO., Ala., 20 South. Rep. 23.

95. PROCESS — Service — Members of Legislature.—Members of the legislature are not liable or subject to the service of civil process during the periods excepted by section 22, art. 2, of the constitution of the State of Kansas, and the service of original process upon them at such times is void, and gives the court no jurisdiction over the person of such member.—COOK v. SENIOR, Kan., 45 Pac. Rep. 126.

96. RAILROAD COMPANIES—Action for Stock Killed.—In an action brought against a railroad company to recover damages for the alleged killing of stock, where the petition alleges that the railway company had failed to inclose its road with good and lawful fences, it is unnecessary for the plaintiff to further allege that the place so left uninclosed was not one which said company was not compelled by law to inclose.—MISSOURI PAC. RY. CO. v. BORRER, Kan., 45 Pac. Rep. 133.

97. RAILROAD COMPANIES—Consolidation.—Where a railroad company is consolidated with other railroad companies under a new name, it ceases to exist as a corporation, and an action brought by or against such railroad company before its consolidation cannot afterwards be prosecuted by or against it or in its original name.—COUNCIL GROVE, O. C. & O. RY. CO. v. LAWRENCE, Kan., 45 Pac. Rep. 125.

98. RAILROAD COMPANIES—Fires.—Where a railroad company is sued for damages resulting from a fire alleged to have been set by its locomotive, in order to raise the presumption of negligence, so as to cast on defendant the burden of showing that its engine had suitable appliances and was properly managed, the jury must be reasonably satisfied, from the evidence, that the fire was caused by sparks emitted in unusual and dangerous quantities from defendant's engine, and evidence merely "tending" to prove such fact is not, as a matter of law, sufficient.—LOUISVILLE & N. R. CO. v. MALONE, Ala., 20 South. Rep. 33.

99. RAILROAD COMPANIES—Rules of Employment.—To prevent a recovery for the death of an employee of the defendant railroad company for personal injuries, on the ground that a violation by the employee of a rule of the company contributed to his death, it is necessary to show that the rule was known to the employee.—LOUISVILLE & N. R. CO. v. MOTHERSHED, Ala., 20 South. Rep. 67.

100. RECEIVERS—Attorney's Fees.—A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate, since it is the personal duty of the receiver to look after such matter.—SAULSBURY v. LADY ENSLEY COAL, IRON & RAILROAD CO., Ala., 20 South. Rep. 72.

101. REMOVAL OF CAUSES—Diverse Citizenship.—An agent or trustee, appointed by both parties to a sale of lands to hold the deed, purchase money notes, and mortgage securing them until certain conditions are performed, is a necessary, and not a merely formal, party to a suit for specific performance brought by the vendor against him and the vendee, wherein part of the relief sought is a decree compelling such trustee to record the deed and deliver the notes and mortgage in accordance with the contract; and if the complainant and the trustee are citizens of the same State, the suit is not removable by the vendee, though he be

a citizen of a different State.—SCOUTT v. KECK, U. S. C. C. of App., 73 Fed. Rep. 900.

102. REPLEVIN—Wrongful Attachment — Pleading.—M, who was a sheriff, under a writ of attachment, levied upon, seized, and afterwards, under execution, sold, personal property which was in the possession of J, a stranger to the attachment proceedings. J brought replevin to recover possession of the property, or the value thereof. In his answer, M averred that he levied upon and seized the property under and by virtue of a writ of attachment, but failed to aver and prove that the attachment proceedings under which the writ was issued conformed to the statute in relation to attachments: Held, that J was entitled to recover.—JONES v. MCQUEEN, Utah, 45 Pac. Rep. 202.

103. SALE BY HUSBAND TO WIFE.—Under the married women's act (Revision, p. 639), which leaves matters of dealing between husband and wife as at common law, a sale by a husband to his wife, attended by delivery of the thing sold, will not be sustained in a court of law.—HOMAN v. HEADLEY, N. J., 34 Atl. Rep. 941.

104. SALE—Chattel Mortgage.—Though a purchaser of chattels buys, after being informed that there had been a mortgage on them, without making any inquiry in regard to the mortgage, he can hold against it, though it has not been paid; it not having been recorded, and having expired by limitation five months before, without being renewed, and the mortgagee not having taken possession of the property.—DOLE v. BANK OF AKRON, Colo., 45 Pac. Rep. 226.

105. SALE — Conditional Sale.—Where a conditional sale of merchandise was made by the agents of the owner, retaining title until payment, and such agents afterwards agreed to a composition of the debt to enable the purchasers to make a resale, by which they were to accept from the new purchaser a smaller amount in full payment of part of such amount, and a tender of the remainder, divested the seller of title, and an action of detinue cannot be maintained.—INGERSOLL-SERGEANT DRILL CO. v. WORTHINGTON, Ala., 20 South. Rep. 61.

106. SALE—Warranty.—Plaintiff bought an animal of defendant, taking a warranty to himself, but making the purchase, in reality, for others, to whom he at once turned over the property and assigned the warranty. Defendant knew for whom the purchase was made, and that the transfer was made to plaintiff for the purpose of enabling him to make a profit from the real purchasers: Held that, in equity, the sale was one to plaintiff, as agent for the purchasers, and that an action could be maintained by plaintiff, on the warranty, for the use of the purchasers who suffered loss by its breach.—DARDEN v. ONEAL, Tenn., 35 S. W. Rep. 1095.

107. SET-OFF—Federal Courts.—Where the State statute of set-off, as in Illinois, does not authorize a set-off, in action on contract, of unliquidated damages arising out of contracts or torts, not connected with the subject-matter of the suit, there can be no set-off, in an action at law, of such damages, even as against an insolvent or non-resident plaintiff.—CHARNLEY v. SIBLEY, U. S. C. C. of App., 73 Fed. Rep. 980.

108. SPECIFIC PERFORMANCE — Defenses.—In an action by a vendor to enforce the specific performance of a contract for the sale of lands, the existence of mortgages amounting to far less than the contract price to be paid by the purchaser, and which can be discharged out of the purchase money, does not constitute a bar to the action.—GUILD v. ATCHISON, T. & S. F. R. Co., Kan., 45 Pac. Rep. 82.

109. TRADE-NAMES — Injunction.—Defendant, who was doing business under the name of the N. C. Co., unincorporated, on the formation of a corporation by that name, transferred to it his business, and the good will thereof, and was taken by the corporation into its employ as an officer for four years: Held, that defendant, on the dissolution of his connection with the corporation, and engaging in a rival business, would not be enjoined from advertising himself as formerly connected with such corporation.—NEWARK COAL CO. v. SPANGLER, N. J., 34 Atl. Rep. 932.

110. TRESPASS TO TRY TITLE—Presumption of Title.—The presumption of superior title in plaintiff, from prior possession, as against a trespasser, is not overcome by proof of a grant from the State to one with whose patent plaintiff's chain of title does not connect.—HOUSE v. REAVIS, Tex., 35 S. W. Rep. 1063.

111. TRIAL.—After defendant has answered, and a jury has been empaneled to try the issues of fact joined, the court is not authorized, on its own motion, to dismiss and withdraw from the jury a count of the complaint declaring on a separate cause of action.—KYES v. BEST, Colo., 45 Pac. Rep. 227.

112. TRIAL — Juror — Competency.—In the examination of a juror on his *voir dire*, in an action against a railroad company for damages arising from personal injuries, he admitted that he had a feeling against railroads generally, and said that it would require a continual effort on his part to deal with the railroad company in the same way that he would an individual, and that, perhaps, he could not consider the case in an impartial way: Held, that the juror ought to have been excused on the challenge of the defendant for cause.—ATCHISON, T. & S. F. R. CO. v. CHANCE, Kan., 45 Pac. Rep. 60.

113. TRUST—Power of Sale—Mortgage.—A conveyance of all of an insolvent's stock of merchandise, including the unexpired lease of the store building, which empowers the grantee, as trustee, to take immediate possession, and to sell the same for cash, and apply the proceeds to current expenses, to the payment of certain items in full, and to a *pro rata* payment of creditors therein named, or in full if the proceeds are sufficient, the balance, if any, to be returned to the grantor, is a mortgage.—F. D. SEWARD CONFECTIONERY CO. v. ULLMAN, Tex., 35 S. W. Rep. 1072.

114. TRUST—Resulting Trust.—The mere fact that a husband purchased land with funds advanced by his wife, together with declarations on his part to third persons that the land belonged to his wife, does not necessarily raise a resulting trust in the land in favor of the wife, in the absence of evidence of an agreement at the time of the purchase that the land should be purchased for the wife.—IN RE LAU'S ESTATE, Penn., 34 Atl. Rep. 969.

115. VENDOR'S LIEN—Foreclosure.—In a suit brought to recover a debt secured by a lien on real property, jurisdiction to foreclose the lien may be obtained by the statutory notice duly served without the State on a non-resident defendant.—ROLLER v. HOLLY, Tex., 35 S. W. Rep. 1074.

116. VENDOR'S LIEN—Waiver.—A vendor accepting, in payment for land, notes of the grantee which recite that they are liens on the other land,—that fact being also recited in the deed,—waives, as against a *bona fide* purchaser of the grantee, his vendor's lien.—BRIGHT v. MURRAY, Tenn., 35 S. W. Rep. 1088.

117. WATERS—Irrigation — Riparian Proprietors.—In determining the rights of riparian proprietors to the waters of the stream, for irrigation, it is within the power of a court of equity to apportion the flow by periods of time, rather than by division of the quantity, when such apportionment would best secure the rights of the parties; and such apportionment may be extended to the use of the water for domestic purposes, when necessary.—WIGGINS v. MUSCUPIABE LAND & WATER CO., Cal., 45 Pac. Rep. 160.

118. WILLS—Life Estate.—Under a devise to testator's daughter of land "to be held and enjoyed by her during her natural life, and after her death to be equally divided among her children, if she shall leave children, and, if not, then to be equally divided among my other children," the daughter took a life estate, with remainder to testator's other children, contingent on the death of the life tenant without surviving children.—ROSENAU v. CHILDRESS, Ala., 20 South. Rep. 95.